

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition
for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

(FCC Triennial Review
9-Month Phase)

Order Instituting Investigation on the
Commission's Own Motion into Competition
for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**SBC California's Comments on the December 4, 2003
Collaborative Workshop on Loop and Transport**

SBC California respectfully submits its supplemental comments to the Report of the Telecommunications Division Staff (Staff) on the Collaborative Workshop on Loop and Transport ordered by Administrative Law Judge (ALJ) Pulsifer's in the October 8, 2003 Ruling.

I. Background.

A. Dedicated Transport and High-Capacity Loops.

This proceeding will, among other things, carry out the analyses of impairment that the FCC's *Triennial Review Order* (TRO) requires for "high-capacity loops" and "dedicated transport." For high-capacity loops, the TRO sets out three methods for assessing non-impairment. The first, called the "self-provisioning trigger," applies to DS3 and dark fiber loops, and is satisfied where two or more competing carriers have already deployed facilities at a customer location. 47 C.F.R. § 51.319(a)(5)(i)(A) & (a)(6)(1)(A). The second method, called the "competitive wholesale facilities trigger," applies to DS3 and DS1 loops, and is met for customer locations where two or more wholesale providers have deployed facilities and offer such loops on a wholesale basis to other competing providers. *Id.* § 51.319(a)(4)(ii) & (a)(5)(i)(B). Third, the FCC's rule establishes an analysis of *potential* deployment. It states that "[w]here neither trigger . . . is satisfied, a state

commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access” at the location in question. The “other evidence” to be considered includes “evidence of alternative loop deployment at that location” as well as engineering and cost conditions that enable carriers to deploy a high-capacity loop. *Id.* § 51.319(a)(5)(ii) & (a)(6)(ii).

The FCC’s analysis for dedicated transport is designed to assess transport “routes” between the incumbent’s central offices. A “route” is “a transmission path between one of an incumbent LEC’s wire centers or switches and another of the incumbent LEC’s wire centers or switches.” *Id.* § 51.319(e). The FCC Rule elaborates that “[t]ransmission paths between identical end points (*e.g.*, wire center or switch “A” and wire center or switch “Z”) are the same ‘route,’ irrespective of whether they pass through the same intermediate wire centers or switches, if any.” *Id.*

For transport, as with high-capacity loops, the FCC’s rules establish “self-provisioning” and “wholesale” triggers, along with a “potential deployment” analysis, for dedicated transport “routes” between the incumbent’s central offices. As with loops, the transport “triggers” are based on the existence, location, and nature of competitors’ transport facilities. Likewise, the “potential deployment” analysis considers the “existence of facilities-based competition” among other factors. *Id.* § 51.319(e)(2)(ii), (e)(3)(ii).

B. The Critical Importance of Discovery.

As is clear from the above, the FCC’s “triggers” for loops and transport are based on the existence, location, and types of loops and transport facilities owned and controlled by SBC’s *competitors* – information that necessarily resides with the competitors. Likewise, the existence of competitive facilities is an important factor that the FCC expressly includes in its criteria for potential deployment. Thus, discovery from competing carriers is critical to SBC California’s ability to present its case and to the Commission’s ability to reach a fully informed decision.

C. SBC California’s *Prima Facie* Filing.

On October 8, 2003, the Assigned Commissioner and ALJ established a preliminary scope and schedule for the various proceedings called for by the TRO. The Preliminary Ruling states that

SBC and Verizon shall serve opening testimony on high-capacity loops and dedicated transport on November 20, 2003. At the same time, the Preliminary Ruling recognized the importance of discovery to the Commission's proceedings. "In view of the broad scope of entities from whom data must be collected in connection with the analysis of triggers," the Preliminary Ruling states "the Commission staff will facilitate discovery workshops to reach consensus on a standardized template of data requests." The Commission will then "prepare a transmittal letter under the signature of Commissioner Kennedy to be sent to all carriers from whom trigger data must be collected, and directing the prompt production of the requested data." In addition, "[i]ndividual parties may also issue their own discovery where interests and questions diverge from the standardized data request template." The Commission's Staff devoted significant time and effort to developing and then issuing standard templates for data requests.

Pursuant to the schedule, SBC California filed its direct testimony on loops and transport on November 20, 2003. As of that date, however, SBC California had only received responses from some carriers, and even the few responses that had arrived were received only shortly before the deadline for direct testimony, and not all were adequately responsive. In accordance with the Preliminary Ruling, SBC California presented a *prima facie* evidence of non-impairment based on the limited information available at the time of its filing. SBC California notes that the unavailability of complete and responsive data related to loop and transport as of the preparation of the November 20 *prima facie* testimony materially affects the adequacy of some parts of the *prima facie* evidence presented to CPUC by SBC California.

With respect to transport, while competing carriers control their transport facilities, SBC owns the central offices at either end of each transport route. Thus, SBC maintains records in the ordinary course of business showing which carriers have already established and connected fiber transport facilities to "collocation arrangements" at SBC's central offices. From those business records, SBC identified which transport routes had a sufficient number of competing providers connected at both central office end points to satisfy the applicable triggers. Given (1) that competing carriers do not spend the time and money to deploy fiber for no purpose, but instead to

connect a central office to their network, and (2) that the FCC's rule defines a transport route by its central office end points, irrespective of the physical path or intermediate facilities in between, these transport connections provide sufficient *prima facie* evidence of the presence of competing transport facilities at the critical endpoints that define a given route.

With respect to loops, SBC California does not maintain information in the ordinary course of business regarding its competitors' facilities; almost by definition, a competitor's loop is designed to bypass SBC California's network. However, parties that seek to connect fiber optic equipment to a communications network register that equipment and its location with codes that are used throughout the industry. Independent third parties access and compile that information for carriers to use in making business decisions about which customers and markets to target. SBC California was able to obtain information from one of these parties regarding the location of competitors' fiber optic facilities, and the identities of the carriers that own that equipment. SBC California relied on that information to determine which customer locations satisfy one or both FCC triggers.

SBC California proactively acquired information to present a *prima facie* case based on evidence available to it at the time and in the absence of full CLEC responses to discovery requests. Nevertheless, at the time of its direct testimony SBC California did not have the opportunity to compare its own results with the CLECs' own records and identify (much less work to narrow) potential disputes. Indeed, even at the time of the December 4 Workshop several carriers with significant activity had yet to respond to the Commission's discovery templates. The discovery that has been received thus far, however, suggests that a complete picture would provide a substantial opportunity to narrow the issues in dispute. For example, where two CLECs confirm that they have deployed high-capacity loops at a given location and are serving other carriers or end users, all parties should be able to agree that the trigger has been satisfied at that location, and the parties and the Commission can focus their attention on locations where there is disagreement.

The results of discovery will also permit SBC California to present a narrowly focused potential deployment analysis. As to transport, SBC California does not intend to seek non-impairment as to any routes not identified in its direct testimony. Instead, SBC California intends to

use potential deployment solely as an alternative basis to find non-impairment on routes already identified by SBC California's "trigger" analysis: for example, where the CLECs agree that competitive facilities have been deployed but contend that the trigger is not satisfied on some technical ground.

With respect to loops, SBC California seeks to identify additional customer locations on a narrow basis: focusing solely on locations within a short distance of existing fiber facilities in a few dense urban wire centers, where there is already evidence of existing alternative deployment. The FCC has specifically identified such evidence as an important consideration, and it provides concrete demonstration (as opposed to abstract economic theory) that deployment is possible.

II. Procedure Going Forward.

While the parties' comments are likely to identify several issues in dispute, there are two critical points that no party can seriously dispute:

- 1) The CLECs have information that is critical to the FCC's impairment analyses and with which parties can identify and narrow the issues in dispute;
- 2) As of the date of SBC California's direct testimony (and even as of today), not all CLECs had provided that information in response to the data requests of the Commission or SBC California, and SBC California did not have a reasonable opportunity to review and incorporate any of the information it had received.

There is no need to point fingers or assess blame. The question that matters is what to do about these undisputed facts. The CLECs appear to contend that the Commission should do *nothing*: They seek to arbitrarily bar the incumbents from presenting evidence of non-impairment as to any route or location not identified in direct testimony – even if discovery received from the CLECs themselves *after* the date of direct testimony conclusively demonstrates non-impairment for an additional route or location. Such a result is patently unfair to SBC California (which should not be punished for not presenting information it did not have) and would virtually guarantee that the Commission reaches an incorrect result on the merits. Further, it would turn the Commission's

efforts to obtain discovery into a massive waste of time if the information obtained is not given due consideration in this proceeding. Clearly, if evidence from the CLECs themselves demonstrates non-impairment, they should not be allowed to evade such a finding.

Conversely, SBC California does not intend a “free for all” nor does it want to be in the position of having to continually update its initial filing as additional information arrives, as some CLECs have suggested. But it is just as clear that SBC California should have an opportunity to act on the results of discovery, and that no such opportunity has been afforded it as of yet. There is a middle ground. SBC California proposes that the Commission take the following steps:

- (1) Specify a reasonable date certain by which the remaining CLECs are to respond to the Commission’s discovery (in this regard, SBC California has already worked with Staff to identify a limited set of priorities, where responses would at least allow SBC California to go forward);
- (2) Permit the incumbents to file supplemental testimony, to be filed within 10 days of the date specified in (1);
- (3) Provide the CLECs an opportunity to respond to the incumbents’ direct and supplemental testimony; and
- (4) Set dates for hearing and briefing of any remaining issues in dispute.

The Commission and the parties have already undertaken significant efforts to develop and carry out a workable discovery process. To reach a result that is both correct and fair, and to carry out the intent of its original schedule, the Commission should adopt an order and a schedule for the remainder of this proceeding in accordance with the principles set forth above.

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